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No. 73-1216

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

RUBY DAVIDSON WALDEN
and
WILLIAM LUTHER WALDEN,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

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On February 8, 1974, Petitioners, by counsel, filed a Petition for a Writ of Certiorari which raised a provocative, substantial, and urgent constitutional claim concerning impermissible military intrusion

into a civilian criminal investigation.

Sometime in April, 1974, [1] the Solicitor General, or more likely one of his subordinates, filed a Memorandum in Opposition to the Petition for a Writ of Certiorari. The Solicitor General, or more likely one of his subordinates, made the following argument on page 3 of his Memorandum:

> "1. Petitioners' contentions were not properly before the court of appeals and are not properly raised here. Petitioners made no objection at trial to the introduction of the testimony of Corporal Durham and the other Marines and thus failed to preserve the issue for appellate review. See Rule 51, Fed. R. Crim. P. Since admission of the testimony was not clearly erroneous and did adversely affect the integrity and fairness of petitioner's trial, there was no "plain error" to be noticed by the court of appeals

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[1] The Solicitor General, or more likely one of his subordinates failed to put the entire date on the Memorandum.

"under Rule 52(b), Fed. R. Crim. P. [2]See generally 3 Wright, Federal Practice and Procedure: Criminal 372-275.

"[2] Under the proposed amendments of the Rules, promulgated by this Court on April 22, 1974, Rule 12(f) would require that petitioners' claim be treated as waived because not raised prior to trial. This amendment, we believe, simply reflects prior law."

Plainly, Rule 51, requires no objection at trial. Petitioners made a pre-trial Motion to Suppress the evidence which was denied. Footnote 2 of his memorandum gives some indication of just how wide of the mark Mr. Bork or his subordinate was on this score.

On May 13, 1974, the petition was denied. The reasons for said denial are impossible to determine but since the Solicitor General's argument, reprinted above, seems to be his first line

opposition, it is assumed that this is the ground upon which the petition was rejected.

Shortly after May 6, 1974, the Solicitor General was informed of the misleading and false assertions in his memorandum by way of the letter reprinted below:

May 6, 1974

Robert H. Bork, Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: Ruby Davidson Walden
and
William Luther Walden
vs.
United States of America
No. 73-1216

Dear Sir:

I call attention to an error in your Memorandum for the United States in Opposition that I believe in all fairness you should correct.

On page three, you noted that the issue of use of the military for investigative purposes was never raised and that petitioners made no objection at the trial of the case. If you had taken time to look at the record you would have seen that a timely motion to

suppress was filed and a hearing had which was rejected by the trial Judge, Albert Bryan. Under the rules, this was proper and timely and the error was raised.

Out of fairness, you should correct the record.

Yours very truly,

FBT:tm FRANK B. TAVENNER

cc: Clerk, U.S. Supreme Court

But for the apparent negligence of the Solicitor General or his subordinates, argument number one, reprinted above, would never have been made. It was for that reason that no reply brief was filed. It was hoped that the Solicitor General would see clearly the error of his ways and be quick to so inform the Court rather than requiring petitioners to bear the financial burden of this task. To this date, so far as can be determined, the Solicitor General has let stand this

erroneous statement.

It is easy to understand how an individual such as the Solicitor General or his subordinate, so removed and distant from trial practice, could have made this error in the first instance. It is, I submit, impossible to understand how this individual could allow an erroneous statement to stand in the face of the above reprinted letter.

Due to the above discussed intervening factors and to the urgency of petitioners' substantial constitutional claim, it is respectfully requested that the Court rescind its prior denial and grant petitioners a Writ of Certiorari.

Respectfully submitted,

FRANK B. TAVENNER
Counsel for Petitioners

May, 1974

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Rehearing of Order on Petition for Writ of Certiorari was mailed, postage prepaid, to Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, this 30th day of May, 1974.

I further certify that this Petition for Rehearing is made in Good Faith and not for purposes of delay.

Frank B. Tavenner

FRANK B. TAVENNER
Counsel for Petitioners